STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Hilda R. Gage, Kathleen Jansen, and Peter D. O'Connell, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

TERRY LYNN KATT,

Defendant-Appellant.

Supreme Court No. 120515

Court of Appeals No. 225632

Circuit Court No. 98-404839-FC

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ORAL ARGUMENT REQUESTED

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I. **DID THE TRIAL JUDGE COMMIT REVERSIBLE ERROR IN ADMITTING, UNDER THE RESIDUAL EXCEPTION, MRE 803(24), OVER DEFENSE COUNSEL'S OBJECTION, THE HEARSAY TESTIMONY OF A SOCIAL WORKER ABOUT WHAT DESI DILLON TOLD HER?**

Trial Court answers, "No".

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Berrien County Circuit Court by jury trial or bench trial, and a Judgment of Sentence was entered on July 12, 1999. A Claim of Appeal was filed on February 29, 2000 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated July 13, 1999, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed Mr. Katt's convictions, but ordered correction of the Judgment of Sentence, in a published opinion on November 13, 2001. This Court granted leave to appeal in an order dated July 2, 2002.

This Court has jurisdiction in this appeal as of right as provided for by Const 1963, art 1, sec 20, Const 1963, art 6, secs 1 and 4; MCL 600.308(1) and MCL 770.3; MCR 7.203(A), MCR 7.203(A), MCR 7.204, MCR 7.301, and MCR 7.302.

STATEMENT OF FACTS

SUMMARY

Defendant-Appellant Terry Katt was charged with four counts of first-degree criminal sexual conduct (CSC). MCL 750.520b(1)(a). The charges concerned two children, Desi and Amanda Dillon, who were seven- and five-years old and who lived in the same house in St. Joseph as Mr. Katt. Living in the house in addition to the children and Mr. Katt were the children's mother, Grace Grissom; the owner, David Thimell, who was both Grissom's ex-husband and her current fiancée; Grissom's brother, Charles Archer; and a roomer, John Kiste. The charged incidents allegedly occurred in the two-month period between August 15 and October 23, 1998. See Amended Information, 15a-19a.

The prosecution theory was that Terry Katt repeatedly came into the children's bedroom late at night when everyone else was sleeping, took off their clothes, and sexually penetrated Desi and Amanda Dillon. T 88-92;[1] 67a-71a.

The defense theory was that the charged acts never occurred. There was no medical evidence supporting the allegations, despite the children's young age and the hundreds of times that the incidents allegedly took place. T 93-95, 634-636; 72a-74a, 199a-201a. The children were scared of Grace Grissom due to her severe discipline or mistreatment of them, and she had them tell stories against Terry Katt in retaliation for Katt calling Children's Protective Services to report Grissom for beating her children. In addition, she wanted to remarry David Thimell, the house owner, but was having sex with John Kiste, one of the roomers; she wanted to get revenge on Terry Katt for having told Thimell that Grissom was cheating on him. T 97-99, 639-641,

[1] Citations to the transcripts are in the following form: M + date means a motion hearing; T means the three volumes of trial of June 1, 2, and 3; O + date means an order; and S means the sentence of July 12, 1999.

661-662; 75a-77a, 202a-204a, 209a-210a. "This case is about the sexual and financial scheming ... of the mother of these children, Grace Grissom." T 97; 75a.

After a three-day jury trial before the Honorable Paul L. Maloney in Berrien County Circuit Court, Terry Katt was acquitted on one count of first-degree CSC, but was convicted on the other three counts. T 675-676; 220a-221a. The trial court sentenced him to life terms as a second offender, MCL 769.10. Judgment Of Sentence, 222a.

BACKGROUND

Grace Grissom and her two children moved from Kentucky to David Thimell's house at 1011 Michigan Avenue in St. Joseph on August 16 or 17, 1998. T 101, 206-208; 78a, 113a-114a. Ms. Grissom was still married to her fourth husband, but she moved to Michigan where Thimell, her ex-husband, had recently inherited a house from his mother. T 118, 216; 86a, 117a. Ms. Grissom stayed with Mr. Thimell in one room and the two children stayed together in a separate bedroom. T 209, 415; 116a, 152a. Ms. Grissom began referring to Mr. Thimell as her fiancée. Terry Katt also lived in the house, in a separate bedroom that he was renting from Thimell. T 209, 218, 415, 534; 116a, 118a, 152a, 162a. On September 7th, Grace's brother, Charles Archer, moved into the house from Kentucky. T 332-333; 148a-149a. A few days later John Kiste also moved into the house. T 333, 548; 149a, 163a. Mr. Kiste had lived with David Thimell previously and knew Grace Grissom and her children. T 415-416; 152-153a.

Terry Katt walked in on John Kiste and Grace Grissom "kissing and rubbing on each other" on September 16th. T 551; 164a. Mr. Katt, feeling that Grace was using Mr. Thimell, went to Thimell's workplace and reported what he had seen. T 232-233, 552; 148a-149a, 165a. Two days later there was a tense confrontation in the kitchen involving John Kiste, Grace

Grissom, David Thimell, and Defendant Terry Katt. T 233, 553; 122a, 166a. According to Mr. Thimell and Mr. Katt, Grace Grissom repeatedly screamed that she was going to "get even" with Katt. T 235, 554; 123a, 167a. Ms. Grissom did not remember making such a statement, but admitted that it was possible that she made it. T 117; 85a. David Thimell described the situation, "I think if everybody would have had a gun, everybody would have shot everybody." T 235; 123a. Mr. Katt testified that John Kiste also told him that he was "dead meat." T 554; 167a.

Terry Katt testified that he made a police report about the threats made against him by John Kiste and Grace Grissom. T 554; 167a. Ms. Grissom did not make any more specific threats against him, but she did continually suggest that Mr. Thimell evict Mr. Katt, and she implied that Thimell had to choose between Katt and herself. T 238, 557; 124a, 168a.

INVESTIGATION

Grace Grissom claimed that she found out that Defendant Terry Katt was sexually abusing her children when she woke up at 3:00 in the morning on Saturday, October 24, 1998, to go to the bathroom. She said that she saw her daughter Amanda standing in the hallway without any underwear on. T 104; 79a. Ms. Grissom said that Amanda told her Mr. Katt "got her up and put her down in the bed just as I got up." T 108; 80a.

Ms. Grissom did not report the alleged incident to anyone immediately. She left her children at home that morning and drove to Indiana with David Thimell to buy cigarettes. T 114; 84a. Upon their return to St. Joseph, Mr. Thimell took a nap. T 229; 120a. Ms. Grissom talked with both her children again and woke Mr. Thimell up from his nap to tell him that Amanda wanted to talk to him about alleged sexual incidents with Mr. Katt. M 5/26/99 at 28; 62a. Mr.

Thimell requested that he be able to speak with Amanda alone, but, according to Thimell, Grace refused, saying "What do you think they're going to do, change their story?" M 5/26/99 at 28; 62a; T 224; 119a. At Ms. Grissom's insistence, Mr. Thimell went to the police station that evening to file a complaint against Mr. Katt. M 5/26/99 at 30-31; 63a-64a. Since the detective in charge of cases of child sexual abuse was not available, Mr. Thimell was told he would be contacted on Monday. Mr. Thimell told the officer on duty that he thought Ms. Grissom was fabricating the charges to get back at the defendant and that it sounded like a setup. M 5/26/99 at 31; 64a. He later told Mr. Katt about the accusations. T 592; 178a.

Children's Protective Services (CPS) received an anonymous call on Monday, October 26, reporting the alleged physical abuse of Desi and Amanda Dillon by their mother. T 289-290; 133a-134a. CPS worker Angela Bowman came to Desi Dillon's school to interview him about the abuse. Ms. Bowman asked him questions and inspected his body for bruises and other markings. T 288-289; 132a-134a; M 5/13/99 at 91-92; 37a-38a.

During the course of the routine interview, Desi said that Terry Katt did "nasty stuff" to him and his sister and that Katt was "going to go to jail." M 5/13/99 at 122-123; 47a-48a. Ms. Bowman stated that she asked Desi, "Who told you that? How do you know he's going to go to jail," but he just kept repeating the statement. Id., at 123; 48a. Ms. Bowman continued questioning Desi on the subject and decided that there was a high likelihood that Desi and his sister were sexually abused. Desi said that Mr. Katt performed oral sex on him and his sister, stuck his finger in his sister's rectum, and did something to him that Desi described as "hunching." Id., at 125; 49a. Ms. Bowman stated that Desi told her this happened "a hundred times," which she interpreted to mean that it happened "several times or very often." Id., at 125-126; 49a-50a. She thought Desi's comment about Mr. Katt going to jail meant that "Desi had

disclosed this information, perhaps, to his mother, and at least the mother and David Thimell may have been aware of the allegations." Id., at 133; 52a. She agreed that it was her impression that she was "talking to a child who had, to a greater or lesser extent, previously conveyed these facts to someone." Id.

Based on her interview Angela Bowman contacted the police about suspected sexual abuse. M 5/13/99 at 131; 51a. Since the children were living in a home with a suspected sex offender and the mother could not provide a stable home environment for them, they were removed from Ms. Grissom and placed in a foster home. Id., at 94; 39a.

Detective Lieutenant James Reeves met with Grace Grissom for an initial interview on Tuesday morning, the same day that Angela Bowman interviewed Desi. T 433; 157a. Soon after that initial interview where Grace reported the alleged incident, Reeves received the phone call from Bowman about her interview with Desi. Id. Detective Reeves decided to talk with both children that day and ended up submitting the information gathered from the interview to the prosecutor's office for review for criminal charges against Terry Katt, who was soon arrested. T 436; 158a.

The police did not search for Terry Katt's fingerprints, semen, genetic material or DNA, or fiber evidence in the children's room or for physical evidence of the children in Mr. Katt's room. T 436-437; 158a-159a. Detective Reeves admitted that finding such evidence would have been "significant." T 448-449; 160a-161a.

PRE-TRIAL MOTION REGARDING HEARSAY[2]

The prosecution moved to admit Angela Bowman's testimony about the contents of what Desi Dillon told her during their interview pursuant to the residual exception to the hearsay rule, MRE 803(24). M 2/26/99 at 33; 22a; Motion filed 1/12/99; 20a-21a. The prosecutor stated that the Tender-Years exception, MRE 803A, could not be used to let the statement in since that rule requires that only the first statement a child makes about a sexual-abuse incident may come in as evidence, and Desi had spoken to his mother about the allegation. M 2/26/99 at 34-35; 23a-24a. The prosecutor proposed that the residual exception could be used to let in evidence that failed the 803A test. Id., at 33-38; 22a-27a.

The trial judge listened to Angela Bowman's testimony. See M 5/13/99, 89; 36a.

Over defense objections the judge ruled that MRE 803(24) could be used to admit statements that failed under 803A and that Ms. Bowman's testimony passed the 803(24) tests of probativeness and trustworthiness. M 5/26/99 at 5-13; 53a-61a. Relying on In re Snyder, 223 Mich App 85; 566 NW2d 18 (1997), the judge ruled that despite failing under the Tender-Years exception, MRE 803A, Ms. Bowman's recollection of her interview with Desi could come in as evidence under the residual exception, MRE 803(24). M 5/26/99 at 5-13; 53a-61a; O 6/1/99; 65a-66a.

TRIAL

The prosecution's first witness was Grace Grissom. She stated that she learned that Defendant Terry Katt was sexually abusing her children when she woke up at 3:00 in the morning on Saturday, October 24, to go to the bathroom. She saw her daughter Amanda

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[2] There were numerous other pre-trial motions, not relevant to the issue upon which this Court granted leave.

standing in the hallway without any underwear on, and Amanda told her that Katt had put her on the bed. T 104, 108; 79a-80a. Ms. Grissom admitted that she did not call the police and that later that same morning she drove with David Thimell to Indiana to buy cigarettes, leaving her children at the house to be watched by her brother. T 108-109, 114; 80a-81a, 84a. She also admitted that she had been angry that Terry Katt told Thimell that she was sleeping with John Kiste, but claimed that she did not start her affair with Kiste until after the children had been removed from the house. T 110-111; 82a-83a.

Desi and Amanda Dillon testified by closed-circuit television from the judge's chambers.[3] Amanda Dillon, who was six-years old at the time of trial, testified that Mr. Katt had anally and vaginally penetrated her with his penis. T 149-152; 87a-90a. She stated that "Terry done put his dick in me." T 149; 87a. He also anally penetrated Desi. T 155-156; 93a-94a. Amanda used anatomical dolls to show what happened to her and Desi. T 152-157; 90a-95a. She stated at first that the incidents happened five times, but changed her answer to say that they took place ten times and that she had lied in saying it was five times. T 160, 162; 96a-97a. She testified that the incidents always took place in Mr. Katt's room and did not remember having previously said that they took place in her room. T 164; 98a. Her mother had sworn at her and hit her, including with a belt, and she was scared of her mother. T 169, 172-173; 99a, 101a-102a. Amanda admitted having lied previously when she had denied her mom hit her; she testified that her mother told her that if she told the truth she might get her mother in trouble. T 162, 169-170; 97a, 99a-100a.

Desi Dillon, who was seven-years old, said that Defendant Terry Katt "did sick stuff" to him and his sister, but Desi refused to give details. T 182, 183, 185; 103a-105a. When he was

[3] Terry Katt consented to allowing them to testify out of the courtroom. M 5/13/99, 4; 35a.

given anatomical dolls Desi still was not able to show what happened, and only when the prosecution asked Desi if he "remember[ed] Terry doing anything with his finger" did Desi begin to show with the dolls what had happened. T 188; 106a. Desi said that Terry Katt put his finger in Desi's and Amanda's bottoms, put his mouth on Desi's penis, and put his penis in Desi's mouth. T 188-190; 106a-108a. He stated that the incidents happened 100 times, every night that he lived in the same house with Mr. Katt, and that the incidents always took place in Katt's room. T 193-194, 196; 109a-111a. He also confirmed that his mother spanked him, sometimes with a belt and sometimes with a wooden spoon. T 196-197; 111a-112a.

Pediatrician Barton Comstock testified that he found nothing unusual when he examined Amanda and Desi Dillon on October 30, 1998 and that there was no medical evidence that the children had been sexually abused. T 266-268, 273, 279-280, 283; 125a-131a.

As she had done at the motion hearing, Angela Bowman, the children's protective specialist, testified about Desi Dillon's hearsay of October 27. T 288-297; 132-141a. However, Ms. Bowman changed her testimony from the pre-trial hearing and stated, not in response to any question, that Desi's comment about Terry Katt going to jail came from Katt and not from the mother or another adult who talked with Desi beforehand. T 293; 137a. "Based on Desi's statement," she determined that it was Mr. Katt who told Desi about going to jail. T 302; 145a. Ms. Bowman described her conversation with Desi. T 293-297; 137a-141a. Her testimony differed from Desi's testimony, in that she testified that Desi told her that the incidents always took place in the children's bedroom, not in Katt's. T 298-300; 142a-144a.

Robin Zollar, an expert on child sexual abuse, testified for the prosecution. Ms. Zollar stated that planting information with an alleged child victim of sexual abuse "certainly can be done and it certainly has been done in my experience ... It's easy to do." T 405; 150a.

John Kiste testified that he had known David Thimell before moving into Thimell's house, but had only met Terry Katt when Kiste moved in. T 413; 151a. Mr. Kiste never saw Desi or Amanda Dillon in Mr. Katt's bedroom and never saw Katt have any improper activity with them. T 416; 153a. Mr. Kiste stated that he had previously lived with Grace Grissom, that while he was living in Thimell's house he had a sexual affair with her and that the affair was going on before the children were removed from the house and before charges were brought against Katt. T 415, 417-418, 423; 152a, 154a-156a.

David Thimell and Terry Katt testified regarding the confrontation and Grace Grissom's threats against Katt after Katt had told Thimell about her and Kiste. T 232-233, 235, 551-554; 121-123a, 164a-167a.

In his testimony, Terry Katt denied having any improper contact with the children. T 566-567; 169a-170a. At the end of his direct testimony, when defense counsel asked Katt why the jury should believe him, he replied, "I did not do this. It's not -- it's not in my nature to go around and have sex with children." T 567; 170a.

The prosecutor immediately renewed her motion under MRE 404(b) to introduce evidence of Casey Dawson's allegations of an abusive incident from 1997. T 568; 171a. Over defense objection, the trial judge ruled that the alleged Dawson incident could be used. T 571-574; 172a-175a.

When the jury was brought back after the argument on admitting the alleged Dawson incident, the prosecutor cross-examined Terry Katt on the Dawson charge. Mr. Katt admitted that he had been charged with second-degree CSC for allegedly getting into the bathtub with Dawson and grabbing Dawson's penis when he babysat Dawson. Mr. Katt denied the

allegations. T 582-583; 176a-177a. The prosecutor had dismissed the Dawson case. T 592-593; 178a-179a.

In the prosecutor's rebuttal case, Casey Dawson testified that he was now eleven-years old and that Terry Katt took a bath with him and touched his penis when Katt was babysitting him. T 596-600; 180a-184a. Mr. Katt did not do anything else. T 600; 184a. Casey was presented with a police report from the incident in which he told Detective Reeves that he made up some of the allegations against Mr. Katt and that he "doesn't tell the truth" "lots of times," but he said he did not remember making the statements. T 602-605; 185a-188a. When asked by the prosecutor if it was wrong to tell a lie, Casey answered "No." T 605; 188a. He then admitted that he had been angry at Mr. Katt for making him do his homework. T 607; 189a. At the end of Casey Dawson's testimony, the trial judge instructed that the incident was only to be used "to show that the defendant used a plan, scheme, or characteristic scheme that he had used before," and not to show "that the defendant is a bad person or he is likely to commit crimes." T 608-609; 190a-191a.

After final instructions, the jury was sent out to deliberate at 4:57 p.m. T 666; 211a. After an hour and forty minutes of deliberations the jury sent the judge a note: "Some are undecided and unwilling to go either way due to lack of evidence on both parts. Should majority rule or what is our next step?" T 667-668; 212a-213a. Defense counsel argued that the first part of the note showed that the jury did not understand the instruction on burden of proof, and he requested a supplemental instruction that stated that the defense had no burden to produce any evidence. T 668-669; 213a-214a. The judge disagreed and instead said that he would read the standard instruction on a deadlocked jury, CJI2d 3.12, which he did, including that he repeated

that the verdict had to be unanimous. T 670-672; 215-217a. After the instruction, the jury returned to the jury room to order food, eat dinner, and continue deliberations. T 673; 218a.

At 9:04 in the evening the jury returned with their verdict. They found Terry Katt not guilty on the charge of penis-to-anus penetration of Desi Dillon, and they convicted him on the remaining three counts of digital and oral penetration of Desi and Amanda. T 675-676; 220a-221a.

SENTENCE

On July 12, 1999, the trial court sentenced Mr. Katt to four life terms: three life terms for the three substantive CSC convictions and one life term for what it listed as the habitual offender supplement "conviction". Judgment of Sentence; 222a.

APPEAL

On November 13, 2001, in a published opinion the Court of Appeals affirmed Terry Katt's conviction, but ordered correction of the Judgment of Sentence concerning the erroneous fourth life sentence. People v Katt, 248 Mich App 282; 639 NW2d 815 (2001); 223a-238a.

Terry Katt's first issue was that the trial judge committed reversible error in admitting Ms. Bowman's testimony under the residual exception, MRE 803(24), despite the fact that the hearsay evidence was not admissible under the exception that applied to such situations, the Tender-Years exception, MRE 803A. The testimony was inadmissible under the Tender-Years exception because the hearsay was not the first time the statements had been made and "only the first is admissible under this rule." The Court of Appeals acknowledged, "neither this Court nor our Supreme Court have ruled on the issue whether a hearsay statement is admissible under the

residual exception where it does not meet the requirements of an established hearsay exception." Katt, supra at 290; 227a.

The Court "recognize[d] that the residual hearsay exception is to be employed only in 'extraordinary circumstances where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative and necessary in the interest of justice.'" Id., at 300-301; 232a. Nevertheless, it held, "that where a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24)." " Id., at 294; 229a. The Court found that the instant hearsay possessed adequate guarantees of trustworthiness to render it reliable. "[T]he instant case present an extraordinary circumstance where the interests of justice were best served by the admission of this evidence." Id., at 301; 232a.

The Court of Appeals also found no error in Terry Katt's other two issues concerning the trial judge's refusal of the defense request to instruct the jury again on the burden of proof and the admission of rebuttal evidence. Id., at 301, 309; 232a, 236a.

On July 2, 2002, this Court granted Terry Katt's application for leave to appeal, "limited to the issue of whether the trial judge erred in admitting testimony from the protective services worker under MRE 803(24)." People v Katt, 466 Mich 889; 647 NW2d 72 (2002); 239a.

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN ADMITTING, UNDER THE RESIDUAL EXCEPTION, MRE 803(24), OVER DEFENSE COUNSEL'S OBJECTION, THE HEARSAY TESTIMONY OF A SOCIAL WORKER ABOUT WHAT DESI DILLON TOLD HER.

A. INTRODUCTION.

The first question here is whether statements that are covered by, but not admissible under, a different hearsay exception, i.e. the one for Tender-Years, MRE 803A, can nonetheless come in under the residual exception, MRE 803(24). Secondarily, if it can, the question becomes whether the challenged statements in question satisfied the requirements of admissibility under the residual exception.

Michigan's residual exception to the rule excluding hearsay provides for admission of certain types of hearsay statements that are "not specifically covered by any of the foregoing [hearsay] exceptions ...". MRE 803(24).

Mr. Katt asserts that the trial judge committed reversible error in admitting under the residual exception, MRE 803(24), over defense objection, the hearsay statements of a child declarant through a social worker's testimony, where the statements were explicitly excluded from admission under the appropriate hearsay exception, the Tender-Years exception, MRE 803A. Further, Mr. Katt asserts that even if it were permissible for the trial judge to consider admitting the statements under the residual exception, the hearsay did not pass the residual exception's test for admissibility. Likewise, the Court of Appeals clearly erred in affirming his convictions.

B. BACKGROUND

As has been discussed in more detail in the Statement of Facts, supra, the challenged hearsay involves Angela Bowman, a social worker for Children's Protective Services (CPS). She testified about the contents of her conversation with Desi Dillon, in which Desi claimed that Terry Katt sexually abused him and his sister Amanda. Under appropriate circumstances such testimony is admissible under Michigan's Tender-Years exception. MRE 803A. The Tender-Years exception allows the admission of statements describing sexual acts where the declarants are under the age of ten in order to corroborate the declarant's own testimony during the trial. However, "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under the rule." MRE 803A. Desi had made statements about the incident to others before he spoke with Ms. Bowman. The prosecutor admitted that Ms. Bowman's hearsay testimony could not come in under MRE 803A, M 2/26/99 at 34; 23a, and the judge agreed, M 5/26/99 at 7; 55a.

Despite the proposed evidence failing the admissibility test under MRE 803A, the prosecutor moved to have the testimony come in under the residual exception, MRE 803(24). M 2/26/99 at 34-38; 23a-27a. The prosecutor argued that federal courts had evaluated and admitted children's hearsay statements regarding sexual abuse under the federal residual exception. M 2/26/99 at 33-38; 22a-27a. The court questioned whether the residual exception's language that a statement must "not [be] specifically covered by any of the foregoing exceptions" literally means that only the *foregoing* exceptions are applicable in the analysis. M 2/26/99 at 45-46; 32a-33a. The defense argued that the federal cases looked to the residual exception for the admission of such hearsay statements from a child only because there was no federal rule of evidence comparable to Michigan's Tender-Years exception. The defense argued

that in Michigan the Tender-Years exception controlled the analysis of the admissibility of such statements, i.e. that the general residual exception could not be used to circumvent the application of the appropriate specific exception. M 2/26/99 at 42-47; 29a-34a . The defense further argued that the proposed testimony failed the test for admission under the residual exception, MRE 803(24). M 5/13/99 at 115-121; 40a-46a.

The trial court ruled that 803(24) could be used to admit Angela Bowman's testimony, but did not base his ruling on the interpretation of the word "foregoing." The trial court cited the decision of the Court of Appeals in In re Snyder, 223 Mich App 85; 566 NW2d 18 (1997) to stand for the premise that MRE 803A does not "provide the total framework for admissibility of statements of children of so-called tender years." M 5/26/99, 8-10; 56a-58a. Therefore, the trial judge ruled, the prosecutor could look to MRE 803(24) to admit Ms. Bowman's hearsay testimony. The trial court then went on to find that the testimony met the requirements for admissibility under MRE 803(24). M 5/26/99 at 10-13; 58a-61a.

The Court of Appeals affirmed. It acknowledged, "neither this Court nor our Supreme Court have ruled on the issue whether a hearsay statement is admissible under the residual exception where it does not meet the requirements of an established hearsay exception." People v Katt, 248 Mich App 282, 290; 639 NW2d 815 (2001); 227a. However, the Court of Appeals "conclude[d] that defendant's narrow interpretation of MRE 803(24) should be rejected." Id., at 291; 227a. "[T]he majority of federal courts have rejected the identical argument raised by defendant on appeal." Id., at 293-294; 228a-229a. It held, "that where a hearsay statement is inadmissible under one of the established exceptions to the hearsay rule, it is not automatically removed from consideration under MRE 803(24)." Id., at 294; 229a.

The Court of Appeals "recognize[d] that the residual hearsay exception is to be employed only in 'extraordinary circumstances where the court is satisfied that the evidence offers guarantees of trustworthiness and is material, probative and necessary in the interest of justice.'" Id., at 300-301; 232a. However, the Court of Appeals found that the instant hearsay possessed adequate guarantees of trustworthiness to render it reliable. "[T]he instant case presents an extraordinary circumstance where the interests of justice were best served by the admission of this evidence." Id., at 301; 232a.

C. ISSUE PRESERVATION AND STANDARDS OF REVIEW.

As has been previously discussed, this issue was preserved for appeal by the defense objections. M 2/26/99 at 42-47; 29a-34a; M 5/13/99 at 115-121; 40a-46a.

A trial court's decision on the admission of evidence is normally reviewed for an abuse of discretion. People v Crawford, 458 Mich 376; 582 NW2d 785 (1998). However, in People v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999), this Court clarified that decisions regarding the admission of evidence "frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence", which are reviewed de novo. See also People v Small, __ Mich __; 650 NW2d 328, 330 (No. 120617; September 18, 2002). Where such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. Lukity, supra at 488; Koon v United States, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996).

Further, this Court recently explained that "an issue involving the interpretation of a court rule, . . . , is a question of law that we review de novo." People v Petit, 466 Mich 624, 627; 648 NW2d 193 (2002).

D. DISCUSSION.

If the residual exception could be used as a fallback whenever a child's statement of sexual abuse did not meet the strict criteria of the Tender-Years exception, then MRE 803A would be stripped of all meaning, and the line of cases on the Tender-Years exception would effectively be overturned. Moreover, the hearsay evidence admitted against Terry Katt lacked the necessary indicia of reliability and was untrustworthy. Idaho v Wright, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990); People v Welch, 226 Mich App 461; 574 NW2d 682 (1997).

Admission of the hearsay not only violated the rules of evidence, it also denied Mr. Katt's constitutional rights to due process and a fair trial. US Const, Ams V, VI, XIV; Const 1963, art 1, §§17, 20; Walker v Engle, 703 F2d 959, 962-963 (CA 6, 1983)(errors in evidentiary rulings under state law may deny a defendant's federal constitutional right to due process if they render the trial fundamentally unfair).

1. The Rules At Issue.

The Michigan Rules of Evidence went into effect in 1978, but neither the two residual provisions, MRE 803(24) and 804(b)(6), nor the Tender Years exception, MRE 803A, were part of the rules then. The Tender-Years exception, MRE 803A, was added to the rules in 1991. The residual exceptions were not added to the rules until 1996; they are not firmly rooted exceptions to the hearsay rule.[4]

The residual exception at issue here states:

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[4] In Idaho v Wright, 497 US 805, 817; 110 S Ct 3139; 111 L Ed 2d 638, 653 (1990), the United States Supreme Court noted that a residual hearsay exception is not a firmly rooted hearsay exception.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: ...
>
> (24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. ... [MRE 803(24).]

However, the Tender-Years exception is much more restrictive and precise, including that the statement must be made immediately after the incident or after a specified excusable delay, be spontaneous, and be the first such statement a child makes:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same procceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. ...
>
> This rule applies in criminal and delinquency proceedings only.
>
> [MRE 803A]

2. The Trial Court's misunderstanding of In re Snyder.

The trial court relied on In re Snyder, 223 Mich App 85; 566 NW2d 18 (1997) for the premise that it could look to other court rules to admit evidence excluded from admissibility under MRE 803A. M 5/26/99, 8-10; 56a-58a. MRE 803A was not applicable in In re Snyder. In re Snyder, supra dealt with the admissibility of children's hearsay statements of child abuse in a parental-rights termination case. The Court of Appeals, in the that case, noted that in a child protective proceeding such statements should be analyzed for admission under MCR 5.972(C)(2),[5] a rule unique to that type of civil proceeding. *Id.* Conversely, MRE 803A by its explicit terms applies only to criminal and delinquency proceedings. The two rules, MCR 5.972(C)(2) and MRE 803A, are not in conflict and In re Snyder does not support the proposition that MRE 803A can be circumvented in a criminal case by looking to MRE 803(24).

The Court of Appeals did not rely on In re Snyder in its analysis of the instant case. Katt, supra.

3. The Federal Rules of Evidence and the "Near Miss" Rule.

"Michigan rules of procedure and evidence are generally modeled after the federal rules, and, in the absence of state authority, [the Court of Appeals] may properly look to comparable federal rules to ascertain the intent of a given state rule." People v McEwan, 214 Mich App 690,

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[5] MCR 5.972(C) provides, in pertinent part:

(1) Except as otherwise provided in these rules, the rules of evidence for a civil proceeding . . . apply at trial, notwithstanding that the petition contains a request to terminate parental rights.

(2) A statement made by a child under 10 years of age describing an act of child abuse as defined in section 2(c) of the child protection law, MCL 722.622(c); MSA 25.248(2)(c), performed with or on a child, not otherwise admissible under an exception to the hearsay rule, may be admitted into evidence at the trial if the court has found, in a hearing held prior to trial, that the nature of the statement provide adequate indicia of trustworthiness, and that there is sufficient corroborative evidence of the act.

697; 543 NW2d 367 (1995). There is no exception in the Federal Rules of Evidence that is comparable to Michigan's Tender-Years exception, MRE 803A.[6] Michigan incorporated the federal version of the residual exception into MRE 803(24) in 1996. *Cf.* FRE 803(24) [since transferred to FRE 807 with no change in meaning intended; see Committee Note, FRE 807].

In 1997, the then existing federal residual hearsay exceptions, FRE 803(24) and 804(b)(5), were transferred and combined into a newly created FRE 807. [See FRE 803(24) and FRE 804(b)(5), which note the transfer.]

FRE 807 provides:

> A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

The Judiciary Committee of the United States Senate amended the original proposed residual exception after the House had rejected it, agreeing with the House that "**an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules [of evidence].**" S R No 93-1277, 93d Cong, 2d Sess, at 18 (1974)(Emphasis added); United States v Valdez-Soto, 31 F3d 1467, 1477 (1994)(dissent of Judge Zilly). The committee stated, "**It is intended that the**

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[6] In the trial court, the prosecutor argued that two federal cases, United States v Juvenile NB, 59 F3d 771 (CA 8, 1995) and United States v Grooms, 978 F2d 425 (1992), supported the position that Desi's hearsay statements to Bowman are properly admitted under the residual exception. However, the cases are not instructive because the Federal Rules of Evidence do not contain anything comparable to Michigan's Tender Years exception, MRE 803A. Thus, under the Federal Rules of Evidence, the only place to analyze the admissibility of such a statement is under the residual exception.

residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. ***The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within on of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions***." Id. (Emphasis added).

The residual exceptions were intended to be applied with great caution. The rules "do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." McCormick, Evidence, § 324.1, at 907 (Cleary 3d ed. 1984) quoting the Advisory Committee's Note, Fed.Rule Evid. 803(24)

The "near miss" rule maintains that evidence that is generically of a type covered by a specific hearsay exception, but fails the test for admissibility under that specific exception, is **not** admissible under a residual exception. Acme Printing & Ink, Co v Menard, Inc, 812 F Supp 1498, 1526-1527 (ED Wis, 1992); United States v Deeb, 13 F3d 1532, 1536 (CA 11, 1994).

Until the instant case, Michigan's appellate courts had not decided whether this state follows the near-miss rule. See People v Katt, 248 Mich App 282, 290; 639 NW2d 815 (2001); 227a. Below, the Court of Appeals, while acknowledging a split in the federal circuits, adopted the reasoning of the federal circuits that have held where a statement is inadmissible under one of the specific hearsay exceptions, it is not automatically excluded from consideration under the residual exception. Katt, supra at 289-294; 226a-229a.

The majority of federal courts have held that the "near miss" rule is too narrow an interpretation of the residual exception:

> Although some courts have held that if proffered evidence fails to meet the requirements of the Fed. R. Evid. 803 hearsay exception, it cannot qualify for admission under the residual exception, the court declines to adopt this narrow interpretation of Fed. R. Evid 807 as suggested by defendants. Rather, this court interprets Fed. R. Evid 807, along with the majority of circuits, to mean that "if a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception." 5 Jack B Weinstein & Margaret A Berger, *Weinstein's Federal Evidence*, § 807.03(4) (2d ed. 2000). We endorse the reasoning in *United States v Earles*, 113 F3d 796 (CA 8, 1997), which held that "the phrase 'specifically covered' [by a hearsay exception] means only that if a statement is *admissible* under one of the [803] exceptions such [ ] subsection should be relied upon" instead of the residual exception. *Id.* at 800 (emphasis in original). Therefore, the analysis of a hearsay statement should not end when a statement fails to qualify [under one of the firmly-rooted exceptions to the hearsay rule], but should be evaluated under the residual hearsay exception.
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> [United States v Laster, 258 F3d 525, 530 (CA 6, 2001)].

See also, e.g., United States v Earles, 113 F3d 796, 800 (CA 8, 1997); Deeb, supra at 1536-1537.[7]

However, this reasoning is severely flawed. A statement can be "covered" by a hearsay exception without being admissible into evidence under that exception; being covered and being admitted are two different inquiries. Professor Randolph N. Jonakait described the difference:

> Congress limited the residual exceptions to situations where the hearsay is not "covered" by a specific exception; not to those situations where hearsay was "not admissible" under another Rule. "Covered" is a broader term. It implies that hearsay, even though not admissible under a specific exception, may still be within a Rule's ambit. If the specific provision covers the proffered hearsay, it cannot be admitted under a residual exception. Jonakait, The Subversion of the Hearsay Rule, 36 Case W Res L Rev 431, 462 (1986).

Some federal courts have held that admitting hearsay evidence under the residual exception where it fell within the ambit of a specific hearsay exception but clearly failed that

[7] In Katt, supra at 291-294, the Court of Appeals examined these and other federal cases.

exception's test for admissibility would circumvent the purpose of the evidentiary rules. United States v Turner, 104 F3d 217, 221 (CA 8, 1997)(holding that to allow the admission of medical texts "under [FRE] 803(24), when [FRE] 803(18) specifically deals with the admissibility of this type of evidence, would circumvent the general purposes of the rules."); United States v Mejia-Valez, 855 F Supp 607, 617-618 (ED NY, 1994); In re Fill, 68 BR 923 (Bankr SD NY, 1987).

In United States v Mejia-Valez, supra at 616-618, the defendant proffered hearsay statements that were against the declarant's penal interest. However, the statements failed the test for admissibility under the exception for statements against interest, FRE 804(b)(3) because they were uncorroborated and made by an available witness. The Court held that to admit such statements under either of the residual exceptions, FRE 804(b)(5) or FRE 803(24), would be contrary to the Rulemakers' intent. The Court wrote:

> **The statements proffered by defendant were not "unanticipated by the other exceptions" specifically enumerated in Rules 803 and 804.** On the contrary [the] statements are declarations against penal interest that are specifically provided for in Rule 804. [But the statements at issue failed the test for admissibility under FRE 804(b)(3).] Nor do they come within the residual exception in Rule 804(b)(5), because that exception, like the specific exceptions enumerated in Rule 804, is conditioned upon the unavailability of the declarant.
>
> Perhaps recognizing the impossibility of meeting the requirements of the residual hearsay exception contained in Rule 804(5), the defendant sought to bring the statement within the catch-all exception of Rule 803(24) which may be invoked even if the declarant is available. **The residual exception in 803(24), if applied as defendant suggests, would simply override the restrictions Congress has placed on the admissibility of declarations against penal interest.** . . .
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> * * *
>
> **The invocation of the residual hearsay exception of Rule 803(24) here would essentially read the unavailability and corroboration predicates out of the declaration against penal interest exception.**

Id. at 618. [Emphasis added.]

In the case of In re Fill, 68 BR 923, 929 (Bankr SD NY, 1987), the Court ruled that the proffered hearsay testimony fell within the ambit of FRE 803(3), the state of mind exception, but that it was expressly excluded from admission under FRE 803(3), because it was a statement of memory or belief to prove the fact remembered or believed. The Court then further held that the proffered testimony was not admissible under the residual exception because by virtue of its exclusion under the specific exception, it did not involve a new and unanticipated situation. *Id.* at 931. The Court explained that, absent highly unusual circumstances, the utilization of the residual exceptions to the hearsay rule to admit evidence expressly prohibited by a specific exception would result in the virtual destruction of the hearsay rule. *Id.*

In examining the purposes of the residual exception, another federal court wrote:

> Rule 803(24), the hearsay "catch all" exception, applies only in those novel or unusual circumstances where no other exception applies. **Its purpose is to provide a vehicle for growth of the law in areas *unforseen* by the Rule's drafters in enumerating the other 23 exceptions.** [Citations omitted] **This "catch all" exception does not apply where a document fits under a conventional exception, but is excluded simply because there is a failure of proof.**
>
> [In re Denslow, 104 BR 761, 766; 28 Fed R Evid Serv 1501 (ED Va, 1989)(emphasis added)]

Justices of the United States Supreme Court have recognized the split among the federal circuits, but the Supreme Court has not yet decided the issue. See McKethan v United States, 439 US 936; 99 S Ct 333; 58 L Ed 2d 333 (1978)(in dissent from the Court's denials of writs of certiorari, Justices Stewart and Marshall noted the conflict and struggle in dealing with the question of admissibility of hearsay evidence not falling within one of the traditional exceptions).

Given the plain language used, "[a] statement not specifically covered by" [a specific hearsay exception under FRE 803 or 804] and the legislative history behind the adoption of the residuary exception, then FRE 803(24) and FRE 804(b)(5), now FRE 807, Congress clearly did not intend for the admission, under a residual exception, of evidence that falls within the ambit of a specific hearsay exception, but fails the test for admission under that exception.

4. Application of the General Principles of Construction for Statutes and Rules.

"Interpretation of a court rule is subject to the same basic principles that govern statutory interpretation." Kitchen v Kitchen, 231 Mich App 15, 18; 585 NW2d 47 (1998); see McAuley v General Motors, Corp, 457 Mich 513, 518; 578 NW2d 282. The primary rule governing statutory instruction is to first and foremost ascertain and give effect to the manifest intent of the enacting body. Turner v Auto Club Ins Ass'n, 448 Mich 22, 27; 528 NW2d 681 (1995). If the language of a court rule is clear and unambiguous, then judicial construction is normally neither necessary nor permitted. Id.; People v McEwan, 214 Mich App 690, 694; 543 NW2d 367 (1995).

This Court should not allow the admission of proposed evidence under the residual exceptions, given the plain "not specifically covered by" language of MRE 803(24) and MRE 804(b)(7), where that evidence comes within the ambit of a specific hearsay exception but has failed its test for admission. A statement is covered under the Tender-Years exception if it is "a statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice." See MRE 803A. After the determination is made that a statement is "covered," it must pass several subsequent tests in order to be admitted into evidence. Under MRE 803A, the statement must be made immediately after the incident or after a specified excusable delay, be spontaneous, and be the first such statement a child makes, and it

cannot be offered into evidence by the declarant child. Desi's statement to Angela Bowman is "covered" by 803A, but fails its test for admission. It should not have been allowed in under a residuary exception, in the face of its failure under the applicable exception.

If this Court finds instead that the "not specifically covered by" language, means only "not admissible under", then in this case two hearsay exceptions are in conflict: MRE 803A specifically prohibits non-original statements by children under ten describing sexual abuse while 803(24) does not contain such a prohibition. If the trial court's interpretation and Court of Appeals' interpretation of 803(24) were allowed to stand, a significant part of 803A would be rendered meaningless, in effect nullified. Under the rules of statutory and rule construction, that cannot be allowed.

When a court examines two statutes covering the same subject, it must construe them together to give meaning to both, if possible. Bauer v Department of Treasury, 203 Mich App 97, 100; 512 NW2d 42 (1993); see also McCauley, supra at 518. However, "[I]t is a fundamental rule of statutory construction that when a general statute is in conflict with a specific statute, the specific one prevails." People v McEwan, supra at 695; see also Imlay Twp Primary School Dist v State Bd of Ed, 359 Mich 478, 485; 102 NW2d 720 (1960). The "more specific statute or code must prevail ... even though the specific statute was enacted before the general statute." Bauer v Department of Treasury, supra at 100; see also Imlay Twp School Dist, supra at 485.

The specific provision under the Tender-Years exception prohibiting the admission of statements after the first one would become superfluous if the subsequent statements could be easily admitted under the general residual exception every time. This Court would not have intended the general residual exception to trump the specific tests of the Tender-Years exception, even though the residual exception was enacted after the Tender-Years exception. Under the

rules of statutory construction, the trial court erred in its interpretation of MRE 803(24) because it let the general residuary hearsay exception prevail over the applicable specific exception, stripping the specific exception of its meaning.

Further, the situation in the present case is common and not "exceptional." This Court has ruled in similar situations that non-original statements are inadmissible under the Tender-Years exception. People v Baker, 251 Mich 322, 326, 328; 232 NW 381 (1930)(holding that only the child's first complaint, made to the housekeeper, was admissible under the common law tender years exception, and that her subsequent complaint to the neighbor was not admissible); People v Kreiner, 415 Mich 372; 329 NW2d 716 (1982)(holding that the child's statement to the police officer would not have been admissible under the common law tender years exception because it was given after she had already made her original complaint to her mother.)[8]

If the residual exception can be used to admit any number of statements from a child, it will no longer be used only for rare and exceptional situations that were not previously considered by the Rulemakers. In the future the residual exception could be used to admit Tender-Years statements that are not made immediately after the incident or that are introduced into evidence by the declarant, both situations being contrary to MRE 803A. If this Court gives its approval to the admission of the statements in question in the instant case, it will make the residual exception overly broad and it will constitute a major judicial revision of the Tender-Years exception, essentially rendering its requirements nugatory.

The trial court's and Court of Appeals' interpretations of MRE 803(24) are contrary to the rules of statutory construction and the Rulemakers' intent.

5. Policy.

The first-statement test of the Tender-Years exception is firmly rooted in Michigan's common law and still makes sense to keep as a rule today. This Court recognized a Tender-Years exception for hearsay in sexual-abuse cases in People v Gage, 62 Mich 271; 28 NW 835 (1886). The first-statement requirement was acknowledged in People v Baker, supra.

The original version of the Michigan Rules of Evidence, which took effect in 1978, did not include either a Tender-Years exception or a residual exception. While the question of whether or not the Tender-Years rule could still be used remained open for some time, this Court eventually ruled that the common-law Tender-Years rule did not survive the adoption of the Michigan Rules of Evidence, and such statements were not admissible. People v Kreiner, supra. The Tender-Years exception came back into existence in 1991 when this Court adopted MRE 803A.

MRE 803A reinstated the Tender-Years hearsay exception as it existed under Michigan common law prior to the adoption of the Michigan Rules of Evidence. This included the first-statement requirement.

The first-statement requirement is not a technicality. It is a reasoned determination by this Court that non-original statements of this kind are not trustworthy enough to be considered as evidence.

The first time a child describes the event, the words and ideas are the child's own. After the child speaks with an adult even one time, however, that adult's questions, comments, and even reactions become incorporated into the child's subsequent statements. A child telling his or her story for the first time is able to learn what an adult finds important, silly, or dull, and can

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[8] The Kreiner Court also held that the common law tender years exception had not survived the adoption of the Michigan Rules of Evidence and noted that the Michigan Rules of Evidence (at

alter future narrations accordingly. After the first statement has been made, the story becomes a mixture of the child's own thoughts and those of the adult.

The United States Supreme Court has noted that if there has been evidence that a child was previously interrogated, prompted, or manipulated by adults, the spontaneity of the later statement, may not be an accurate indicator of trustworthiness. Wright, supra, 497 US at 826-827.

One commentator writing for the Harvard Journal On Legislation on different states' Tender-Years rules said:

> Allowing only the first corroborative statement, as Texas and Michigan do, is useful. A child's description of an incident may become tainted by the influences of each adult who questions the child. Therefore, subsequent statements are less reliable than the first statement about the abuse. Marks, Should We Believe The People Who Believe The Children?, 32 Harv J On Legis 207, 244 (1995).

One judge has noted that the first-statement rule "greatly reduces the hearsay dangers peculiar to children." Garcia v State, 792 SW2d 88, 93 (Tex Crim App, 1990) [en banc] [Clinton, J, dissenting]. Original statements are more reliable, "not only because the child's initial disclosure is more likely a self-motivated account of what the child herself remembers, but also because the original statements are untainted by the subtle influences of subsequent interrogators." Id.

In 1999, two prominent researchers, Maggie Bruck and Stephen Ceci, examined studies done over the last few decades for their review article on the suggestibility of children's memory and the danger of false reports of abuse. Bruck, Maggie and Ceci, Stephen, The Suggestibility of Children's Memory, Annual Review of Psychology, (1999) Vol 50, pp 419-439; 240a-256a.

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that time) did not include a residual exception.

They found "increasing numbers of studies. . . demonstrat[e] how children's memories and reports can be molded by suggestions implanted by adult interviewers." Id.; 241a.

The research that has been done supports retention of the first-statement rule. An interviewer's beliefs about an event can influence the accuracy of children's answers, e.g. children sometimes attempt to make their answers consistent with what they believe that the questioner wants to hear. Id.; 244a-245a. Some interviewers convey their bias through leading questions or providing misinformation about the target event. Id.; 245a. Research has found that when later asked questions by a second interviewer, the children's answers remained consistent with the first interviewer's biases. Id.; 244a. "Furthermore, with repeated questions, [children] used fewer qualifiers, omitting phrases such as 'it might have been' and consequently they sounded increasingly confident about their statements. . . . [such that] after several repetitions, their uncertainty is no longer apparent." Id.; 245a. After being suggestively interviewed, children may even include false reports that were not suggested to them, but that are consistent with the suggestions. Id.; 250a. Perhaps most frightening, evidence from the past decade reveals that after children have been suggestively interviewed, they can subsequently "appear highly credible to trained professionals in the fields of child development, mental health, and forensics (citation omitted); these professionals cannot reliably discriminate between children whose reports are accurate from those whose reports are inaccurate as the result of suggestive interviewing techniques." Id.; 250a.

Michigan's first-statement rule is an important one because it is an attempt to ensure that the statement was entirely the child's own recount, and thus trustworthy and reliable. In the present case, Desi had previously discussed the alleged sexual abuses with his mother. PE 11/17/98, 11-12; 13a-14a; M 2/26/99, 34, 39; 23a, 28a; M 5/13/99, 133; 52a; M 5/26/99, 6; 54a;

T 318-319, 146a-147a. Thus Desi's talk with Ms. Bowman was not really in Desi's own words, and no one knows how much of what he told Ms. Bowman came from himself and how much came from Grace Grissom.

A comparison to other states' Tender-Years exceptions highlights the intentional strictness of the Michigan rule. Thirty-eight other states have Tender-Years rules. McLain, Children Are Losing Maryland's "Tender Years" War, 27 U Balt L Rev 21, 76 (1997). In 1982 Washington became one of the first states to codify this hearsay exception, and according to McCormick it became the model for many other states. McCormick on Evidence, §272.1 at II-213. The Washington statute allows hearsay testimony if

> the court finds after a hearing that the time, content, and circumstances of the statement provide sufficient indicia of reliability, and ... the child either testifies at the proceeding or is unavailable as a witness and, if available, corroborative evidence is produced to support trustworthiness. Wash Rev Code Ann, §9A.44.120.

Michigan's rule is stricter than this statute. The Washington statute gives no guidelines on how to determine reliability, whereas statements under MRE 803A must meet several rigid requirements: the statement must be spontaneous, be without signs of manufacture, be made immediately after the incident or after a specified excusable delay, be made by a child under ten years old, and be the first such statement a child makes. The fact that this Court decided to adopt its own common-law rule in MRE 803A rather than adopt the less specific Washington rule as other states had done is further indication that the Court intended that the requirements it set forth be taken seriously.

The history of the rule shows that Michigan's first-statement requirement is not a mistake or an accident. It has been rooted in the state's jurisprudence for at least seventy years. When this Court wrote a Tender-Years exception into the Rules of Evidence, it decided to adopt its

own common law rather than copy another jurisdiction's statute. The Court confirmed the vitality and desirability of the common-law rule when it established MRE 803A. The psychological literature of today supports retention of the first-statement rule.

6. Trustworthiness and Probativeness.

Even if it were appropriate for the trial judge to consider admitting the statements under the residual exception, Ms. Bowman's hearsay testimony did not pass the test for admissibility under MRE 803(24). To be eligible for admission under the residual exception a statement must have "equivalent circumstantial guarantees of trustworthiness" as the specific exceptions. MRE 803(24). If the reason a statement does not come in under a specific hearsay exception is because the Rulemakers showed an intention that the statements at issue were suspect, then the statement cannot be admitted under the residual exception, because it is still untrustworthy. Mejia-Valez, supra; In re Fill, supra; In re Denslow, supra; see also United States v Bailey, 581 F2d 341, 349, n12 (CA 3, 1978); McCormick On Evidence, §324.1 at II-350. Because under the Tender-Years exception, MRE 803A, children's non-original statements about a sexual act are inadmissible, such non-original statements by definition cannot have circumstantial guarantees of trustworthiness equivalent to the specified exceptions.

All non-original statements are deemed inadmissible under the Tender-Years exception, MRE 803A, precisely because they were deemed to be unreliable and untrustworthy. (*See subsection 4, supra.*) In the present case, the trial judge and the Court of Appeals erred in thinking they could find otherwise.

Further, among the prerequisites for admission under the residual exception, a statement must be "more probative on the point for which it is offered than any other evidence the

proponent can procure through reasonable efforts." MRE 803(24). The trial court and the Court of Appeals erred in finding that the statement as issue in the present case met this part of the test for admissibility.

The trial judge decided that the repetitive testimony could be considered "more probative" if it provided details that the declarant's testimony could not and admitted Bowman's testimony. However, the judge then erred when he only examined whether Ms. Bowman's testimony would be more probative than Desi's testimony.

The judge should have examined whether Bowman's testimony recounting Desi's statements was more probative than what Grace Grisson could have offered in her recounting. Desi had told his mother about the incidents prior to speaking with Ms. Bowman. PE 11/17/98, 11-12; 13a-14a; M 2/26/99, 34, 39; 23a, 28a; M 5/13/99, 133; 52a; M 5/26/99, 6; 54a; T 318-319, 146a-147a. Ms. Grissom could have testified to the contents of her conversation with Desi. Because Ms. Grissom testified in the trial anyway, the prosecutor could easily have procured that evidence from her.

It is hard to see how Desi's original statement to his own mother would be less probative than the statement to a social worker made much longer after the incident allegedly occurred. The trial judge erred in misinterpreting the probativeness test as a question solely of whether repetitive evidence could be admitted rather than focusing on which of the available repetitive evidence should be admitted.

Ms. Bowman's own testimony shows why it was not as probative as any evidence Ms. Grissom could provide. Angela Bowman noted that Desi's story showed that he had already described the incident with another adult (M 5/13/99, 133; 52a). By the time Ms. Bowman heard Desi's story it was an amalgam of different points of view. The prosecutor simply did not

inquire, during motions or at trial, about the contents of the conversation(s) between Desi and Grace Grissom. The original listener, Grace Grissom, would be able to provide the most probative evidence.

The admissibility of the instant evidence does not depend on how effective a witness the person is. Angela Bowman was a terrific witness for the prosecution.[9] She was a professional social worker experienced in interviewing children. She was a state-employed expert ostensibly without bias who could not only recount what Desi had told her but describe his demeanor in clinical terms and rationalize any inconsistencies between their interview and Desi's own testimony.

On the other hand, as was cited in the Statement of Facts, supra, Grace Grissom beat her children with belts and wooden spoons, threatened Defendant Katt, had been on drugs, lied about her sexual relationship with John Kiste, and went to Indiana to buy cigarettes the morning after she supposedly learned that her children had been sexually abused. Testifying to the contents of Desi's conversations might have opened Ms. Grissom up to further impeachment. Given the effect Grace Grissom would have on the jury, the prosecution obviously wanted Grissom testifying to as little as possible, but that did not entitle the prosecution to manipulate the rules of evidence to pick and choose which kind of hearsay it presented. The prosecutor should not have been allowed to bolster the credibility of the children's own testimony by offering inadmissible hearsay from an apparently credible witness to corroborate and explain it.

F. CONCLUSION: REVERSIBLE ERROR.

As has been discussed above, by enacting the Tender-Years exception as part of the rules of evidence, MRE 803A, this Court showed the extent to which hearsay from young children would be admissible. Contrary to the findings of the trial judge and the Court of Appeals, the residual provision should not have been allowed as a means to evade a rule enacted by this Court. Further, the residual provisions are not firmly rooted exceptions to the hearsay rule and the hearsay admitted against Terry Katt lacked sufficient indicia of trustworthiness.

The admission of the challenged testimony is reversible error. The testimony of the children was not very probative. Desi and Amanda Dillon were not able to give dates or even say how many times the alleged incidents had happened. Through no fault of their own and just by being young children, they did not make very effective witnesses. Angela Bowman's testimony was the only out-of-court statement detailing what the children had said had happened to them. There was no medical evidence or other physical evidence supporting the prosecution's case. Angela Bowman's testimony was extremely crucial, as was reflected by the prosecutor dwelling on her hearsay in opening statement, closing argument, and rebuttal argument as a reason for convicting Terry Katt. T 90-91, 620-623, 630, 632-633, 647-650; 69a-70a, 192a-199a, 205a-208a. The prosecutor relied on "the level of detail" given to Bowman. T 622, 647, 650; 194a, 205a, 208a.

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[9] Ms. Bowman testified that Desi told her, "Uncle Terry does nasty stuff to me and he's going to go to jail." M 5/13/99 at 122; 47a. Ms. Bowman stated that the part about Mr. Katt going to jail caused her to determine "that Desi had disclosed this information, perhaps, to his mother, and at least the mother and David Thimell may have been aware of the allegations." Id., at 133; 52a. At trial Angela Bowman changed her story about the "going to jail" statement from having originated from Desi to having come from Terry Katt. On direct examination, not in response to any question, Bowman added, "I asked him, 'Who said that Terry was gonna go to jail?' He said Terry told him he was going to go to jail." T 293; 137a. Not only do children learn how to

The testimony and the prosecutor's use of it in argument were so harmful to Mr. Katt that his convictions must be reversed. MCL 769.26; People v Snyder, 462 Mich 38; 609 NW2d 831 (2000). Not only did Desi Dillon tell Angela Bowman an account of what happened to both him and Amanda, but if the jury believed those crimes happened to Desi, they would be more likely to think they happened to Amanda as well. Angela Bowman's hearsay testimony was the major incriminating evidence. The fact that the jury struggled during deliberations, see T 667-672, 212a-217a, shows that the error in admitting the hearsay was not harmless.

This Court should reverse and remand for a new trial.

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change their stories, but a trained social worker also learned what to say in order to help convict Mr. Katt.

SUMMARY AND RELIEF SOUGHT

WHEREFORE, for the foregoing reasons, Defendant-Appellant **TERRY LYNN KATT** requests that this Honorable Court reverse the decision of the Court of Appeals and order a new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

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